Ruling 2004-05

Vermont Department of Taxes

Dated: June 25, 2004

Written By: Judith Henkin, Attorney for the Department

Approved By: Tom Pelham, Commissioner of Taxes

You have requested a ruling on behalf of your business, a CPA firm representing many internet start-up companies located in the <Area> California. The companies you represent provide and sell web-based software products and services, which include products which are used by the purchaser to perform payroll, property and sales tax return processing. This ruling is based on the facts contained in your letter of April 6, 2004.

According to your letter, your clients ("sellers") provide their customers with online software which the customers may access without downloading any software or data to their own computers. The software programs process and calculate the customers' raw data and compute the customers' unique results. The data or final computations are permanently stored on the sellers' servers in California. Customers have access to their data or tax returns by logging on to the sellers' websites. Customers may print hard copies or electronically save back-ups of their data or tax returns on their own computers by utilizing a third-party software product. Also, the sellers have the ability to electronically deliver or file the final tax returns to a third-party or government agency. The sellers charge their customers for the access and use of the online software program, and there is no charge made when customers electronically save or print back-up copies of their data or tax returns. The sellers charge an additional sum to their customers who choose to electronically transfer their tax returns to a third party.

You ask whether the charges for accessing and using the online software are subject to sales and use tax, given that the sellers have nexus with Vermont and their customers reside in the state.

Vermont sales tax is imposed upon the receipts from the sale of tangible personal property sold at retail in the state. 32 V.S.A. § 9771(1).[*] The compensating use tax applies to any use of tangible personal property purchased at retail in this state, and not

[*] Additionally, Chapter 233 of Title 32 imposes sale tax on certain public utility services, 32 V.S.A. § 9771(2); charges for producing tangible personal property for consideration for consumers furnishing the materials for production, *Id.* § 9771(3); amusement charges, *Id.* § 9771(4); the retail sale of telecommunications service provided to a Vermont service address, *Id.* § 9771(5); prepaid phone cards and related items, *Id.* § 9771(6); and the sale of tangible personal property to an advertising agency for use in providing or creating advertising materials for transfer in conjunction with the delivery of services. *Id.* § 9771(7).

subject to the state sales tax. 32 V.S.A. § 9773(1). Under Vermont law, when the right to use your clients' products is transferred to a customer, a "sale" occurs. *See* 32 V.S.A. § 9701(6) (sale means "any transfer of title or possession or both, exchange or barter, rental lease or license to use or consume"). The germane inquiry in determining the transaction's taxability, therefore, is whether or not your clients' products constitute tangible personal property.

Tangible personal property is specifically defined as

> personal property which may be seen weighed, measured, felt, touched or in any other manner perceived by the senses and shall include fuel and electricity, but shall not include rights and credits, insurance policies, bills of exchange, stocks and bonds and similar evidences of indebtedness or ownership.

32 V.S.A. § 9701(7).

As described, the online software your clients offer does not constitute tangible personal property. Unlike the situation where the software has been coded on a tangible medium and delivered to customers by means of the purchase of a physical item (i.e. a magnetic tape or disc), customers purchase only the intangible access to a body of information, which they retrieve from your clients' websites. In contrast to a customer who acquires prewritten software, the information purchased by the customer in this fashion cannot be weighted, measured, felt and touched, does not constitute tangible personal property, and therefore is not subject to the Vermont sales and use tax. *C.f. Chittenden Trust Co. v. King*, 465 A.2d 1100, 143 Vt. 271 (1983) (computer software tape purchased by bank akin to tangible personal property such as films, cassettes and books, and is subject to tax). The fact that a customer may electronically save or print a back-up copy of his or her tax return does not change this result; the customer does not purchase the tax return or other corporeal document derived from use of the computer software, but instead acquires the intangible capability to produce the return or other document, which is not delivered to the customer by way of a tangible medium.

A separate fee associated with the electronic delivery of a tax return is also not subject to Vermont sales and use tax. Although there are instances where in a so-called mixed transaction – one involving the provision of both tangible personal property and intangible services or property rights – the charge for the service may be subject to tax, such is not the case where the focus of the transaction is the provision of services or the transfer of intangible property rights. 32 V.S.A. § 9741(35).

This ruling is issued solely to your business and is limited to the facts presented as affected by current statutes and regulations. Other taxpayers may refer to this ruling to determine the Department's general approach, but the Department will not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statute or regulations.

Section 808 of Title 3 provides that this ruling will have the same status as an agency decision or an order in a contested case. You have the right to appeal this ruling within thirty days.